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No. 90-1481

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAFAEL SANCHEZ and
EDWIN SANCHEZ,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE FIRSTCIRCUIT COURT OF APPEALS RULING ALLOWING A DEFENDANT TO BE CONVICTED OF AIDING AND ABETTING UNDER AN INDICTMENT WHICH DOES NOT CHARGE HIM IN THAT CAPACITY, VIOLATES THE GRAND JURY CLAUSE OF THE FIFTH AMENDMENT AS INTERPRETED BY DECISIONS OF THIS COURT.

II.

WHETHER AN APPELLATE COURT MAY APPLY THE UNITED STATES SENTENCING GUIDELINES SO AS TO CIRCUMVENT THE STRICT NOTICE REQUIREMENT CONTAINED IN THE FEDERAL CONTROLLED SUBSTANCES ACT.

III.

WHETHER INCIDENTS OF PROSECUTORIAL MISCONDUCT, EACH OF WHICH ALONE MAY NOT DENY THE ACCUSED HIS CONSTITUTIONAL DUE PROCESS RIGHTS, DO RISE TO CONSTITUTIONAL MAGNITUDE WHEN OCCURRING CUMULATIVELY ON ONE RECORD.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Rafael Sanchez and Edwin Sanchez, and the Respondent, United States of America.

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No. _____

IN THE

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October Term, 1990

RAFAEL SANCHEZ and
EDWIN SANCHEZ,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

The Petitioner, Rafael Sanchez, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in United States v. Sanchez, 917 F.2d 607 (1st Cir. 1990).

Petitioner, Edwin Sanchez, joins in Questions II and III of this Petition and, based thereon, also respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in United States v. Sanchez, 917 F.2d 607 (1st Cir. 1990).

OPINIONS BELOW

The opinion of the First Circuit Court of Appeals is reported as United States v. Sanchez, 917 F.2d 607 (1st Cir. 1990) and is reprinted in the appendix hereto (App., infra, A-1 to A-61).

The decision of the First Circuit denying rehearing is reproduced in the appendix hereto (App., infra, A-62).

JURISDICTION

On October 24, 1990, the First Circuit Court of Appeals affirmed the decision of the district court. A petition for rehearing was timely filed. Rehearing was denied on November 21, 1990.

The jurisdiction of this Court to review the judgment of the First Circuit Court of Appeals is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States states in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . .nor be deprived of life, liberty, or property, without due process of law."

Title 21, Section 851(a)(1) of the United States Code reads as follows:

> "No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

STATEMENT OF THE CASE

1. Course Of Proceedings And Disposition In Court Below

Following a jury trial before the United States District Court for the District of Massachusetts, Rafael Sanchez was found guilty on both counts of a two count Indictment charging conspiracy to possess with intent to distribute approximately 12 kilograms of cocaine, in violation of Title 21, Section 846 of the U.S. Code, and possession with intent to distribute those same 12 kilograms of cocaine in violation of Title 21, U.S. Code, Section 841(a). Similarly charged and convicted were Co-Defendants, Edwin Sanchez and Rosario Gregorio.

Petitioner Sanchez was sentenced to a term of imprisonment of 360 months on each count, sentences to run concurrently.

STATEMENT OF FACTS

The Government's case rested almost exclusively on the testimony of its confidential informant, Alberto Lagos. Informant Lagos testified that on August 10, 1988, pursuant to an earlier arrangement, he met with Rafael Sanchez in a bar (Caruso's Celebrity Room) in Chelsea, Massachusetts.

Prior to his arrival at the bar, Lagos had recorded a conversation with Rafael Sanchez. An examination of the transcript of this conversation reveals that it dealt with innocuous matters. (R.53-56).[1]

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1. For the purposes of this Petition, "R" shall designate a cite to Rafael and Edwin Sanchez's joint "Record Appendix" filed in their appeal to the First Circuit.

In the bar, Sanchez allegedly indicated that his partner had arrived and had "thirty kilos." Lagos and Sanchez agreed to meet the following day and, in fact, met at approximately 4:00 p.m. at a Dunkin Donuts.

Rafael Sanchez arrived at the Dunkin Donuts in a blue vehicle, while Lagos was using the public telephone outside the restaurant. The vehicle was operated by Edwin Sanchez. This was the first time that the informer met Edwin Sanchez.

Later, Edwin Sanchez drove Lagos in Lagos' vehicle to the vicinity of 75 Winthrop Street, Everett, Massachusetts. After arriving at this address, Lagos observed the appellant Gregorio Rosario. Edwin Sanchez allegedly told Rosario to go to the vehicle to retrieve the

cocaine. Rosario complied with Sanchez's request and went to the blue vehicle. He came back with a suitcase which contained 12 kilograms of cocaine. (R.76). After some conversation ensued concerning the exchange of money, the police came in and apprehended Rosario and Edwin Sanchez. (R.80).

Prior to trial, the defense made a discovery request for exculpatory evidence, including any material or information that could be used for the purpose of impeaching the credibility of any government witness. The government agreed to provide any and all such information in a timely fashion before trial.

Prior to trial, on December 29. 1988, the Assistant United States

Attorney in charge of the case, Mr. Mitchell Dembin, sent a letter to defense counsel with enclosures containing specific information regarding Alberto Lagos, his criminal record and payments made to Lagos by the Federal Bureau of Investigation and the Drug Enforcement Administration. Missing from this material, however, was any reference to payments made by the office of the Attorney General of Massachusetts for state court related investigations that Lagos had participated in and been paid for, prior to his testimony at trial. Moreover, Trooper Joseph Brooks, who was present throughout the trial, had specific knowledge regarding the non-disclosed payments, but never revealed same.

Based on this flagrant violation of the government's obligation to disclose exculpatory material, Mr. Sanchez moved for a new trial. The motion was denied. Subsequently, the defense discovered that, in addition to failing to reveal all relevant impeachment information within his knowledge, Trooper Brooks had actively misstated certain facts in presenting same as corroborative of informant Lagos' testimony.[2] These misstatements were the only evidence offered by the government which directly

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2. Later deposition testimony (given in a related forfeiture proceeding) by Agent Broderick Kennedy, the agent seated alongside Brooks in his patrol car, directly conflicts with Brooks' corroborative testimony.

corroborated Lagos' version of events critical to the government's case.

At the close of evidence, Rafael Sanchez moved for judgment of acquittal. The trial court found that it had a problem denying this motion in connection with Count II. (R.85-86). Ultimately, the court was persuaded by the prosecution to deny the motion and, instead of dismissing the subject Count II, proceeded to charge the jury on the crime of aiding and abetting despite the fact that the indictment stated no such charge. (R.99-100a).

Sometime between entry of the jury's verdict and sentencing, the Assistant United States Attorney acknowledged in a letter filed with the Court that the Government had failed to comply with the

21 U.S.C. Section 851(a)(1) requirement that notice of intent to rely upon former conviction as a basis for sentence enhancement must be served upon the defense and filed with the court. Nevertheless, the government contended, and above defense objection the Court agreed, that despite the government's failure to give notice, the Defendant was subject to increased punishment by reason of former convictions, under the United States Sentencing Guidelines.

REASONS FOR GRANTING THE WRIT

I.

THE FIRST CIRCUIT COURT OF APPEALS RULING ALLOWING A DEFENDANT TO BE CONVICTED OF AIDING AND ABETTING UNDER AN INDICTMENT WHICH DOES NOT CHARGE HIM IN THAT CAPACITY, VIOLATES THE GRAND JURY CLAUSE OF THE FIFTH AMENDMENT AS INTERPRETED BY DECISIONS OF THIS COURT.

The issue of whether or not a Defendant, consistent with the Fifth Amendment grand jury guarantee, may be convicted for aiding and abetting under an indictment silent as to aiding and abetting, is an important question of federal law which has not been, but should be, settled by this Court. The opinion of the First and other circuits that such a conviction is not prohibited by the grand jury clause, is in conflict with all relevant grand jury clause

opinions of this Court. The grand jury clause of the Fifth Amendment to the United States Constitution states, in pertinent part,

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

U.S.Constitution, Amendment Five.

As this Court has stated, any resolution of the propriety of a given indictment, depends ultimately "upon the nature of the 'substantial safeguards' to a criminal defendant which an indictment is designed to provide." Russell v. United States, 82 S.Ct. 1038, 1046, 369 U.S. 749, 763, 8 L.Ed.2d 240 (1962). The nature of these "substantial safeguards" has repeatedly been examined and defined by the Supreme Court. See, e.g., United

States v. Cruikshank, 92 U.S. 542, 558, 23 L.Ed. 588 (1875); Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887); Evans v. United States, 153 U.S. 584, 587, 14 S.Ct. 934, 936, 38 L.Ed. 830 (1894); Cochran v. United States, 157 U.S. 286, 290, 15 S.Ct. 628, 39 L.Ed. 704 (1895); Stirone v. United States, 361 U.S. 212, 80 S.Ct. 170, 4 L.Ed.2d 252 (1960); United States v. Miller, 471 U.S. 130, 105 S.Ct. 1811, 856 L.Ed.2d 99 (1985)

Through these decisions, the Supreme Court has defined three basic functions of the grand jury guarantees: (1) notice to the defendant of the charges against him; (2) protection against double jeopardy on a particular charge; and (3) limitation of an accused's jeopardy to

only those crimes charged by an independent grand jury. This last function was described by the Court in Stirone v. United States, as "the very purpose of the requirement that a man be indicted by grand jury." (80 S.Ct., 273) To this effect, Stirone cited the Ex parte Bain, case:

> "[T]he institution [the grand jury] was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body

> of this district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial." Ex parte Bain, 121 U.S. 1, 11, 7 S.Ct. at 786, 30 L.Ed. 849. (emphasis added).

This screening function of the grand jury is violated when the charging terms of the indictment are amended, either literally or in effect, by the prosecutor or court after the grand jury has last passed upon them. Stirone, 80 S.Ct., 273. Based on Bain, Stirone and basic principles of constitutional construction, many Circuits have recognized an error per se rule applicable to any indictment amendment. (See, e.g., Gaither v. United States, 413 F.2d 1061 (D.C. Cir 1969); United States v. Carroll, 582 F.2d 942 (5th Cir. 1978);

United States v. Peel, 837 F.2d 975 (11th Cir. 1988).

In United States v. Miller, 105 S.Ct. 1811 (1985), the Supreme Court reaffirmed the basic proposition of Bain and Stirone to the effect that the grand jury clause guaranteed "the right of an accused to be tried only on charges that had in fact been passed on by a grand jury." United States v. Miller, 105 S.Ct., 1815. The only type of amendment which the Miller court did find to be constitutionally permissible, was an amendment which narrows the original contents of an indictment, so that conviction, while sustained on only a part of the indictment charges was, nevertheless, sustained upon elements fully and clearly set out in the

indictment. However, Miller specifically distinguished the narrowing type of amendment it dealt with, from the Stirone "broadening" type of amendment; Miller confirmed the Stirone rule that an amendment which results in "broadening the possible bases for conviction from that which appeared in the indictment" was constitutionally unacceptable. Miller, 105 S.Ct. 1816.

The Miller court was not presented with an aiding and abetting amendment. However, it is clear that such an amendment is not classifiable as a narrowing amendment, the only type of amendment which Miller excepted from the "error per se" precedent of Bain and Stirone.

In direct conflict with this precedent, the circuit courts have allowed trial courts to amend an indictment by offering an aiding and abetting instruction, under an indictment which makes no mention of aiding and abetting.

The circuits support their conclusions in most cases with the succinct proposition that aiding and abetting is not a separate offense but, rather, a theory of law. E.g., United States v. Sanchez, (917 F.2d 901 (1st Cir. 1990), United States v. Thirion, 813 F.2d 146 (8th Cir. 1987); United States v. Moya-Gomez, 860 F.2d 706, 756 (7th Cir. 1988). Amongst the plethora of circuit holdings adopting this position, it is only the exceptional case which

makes a reasoned attempt to reconcile this position with Stirone's error per se rule. One such case which does attempt the exceptional analysis, is United States v. Galiffa, 734 F.2d 306 (7th Cir. 1984).

An examination of the reasoning in Galiffa brings to light an error which is at the source of the aiding and abetting precedent in the circuits. Galiffa recognizes, but mixes its analysis of, the various functions of the grand jury clause. Initially, Galiffa recognizes that an indictment must limit the jeopardy of the accused to only those charges which have been independently screened and "presented in an indictment returned by a grand jury." (Galiffa, 734 F.2d 311). However, Galiffa then

suggests a test appropriate only to detecting violations of the notice function of the grand jury indictment; "so long as no unfair surprise results," Galiffa urges, no violation of the grand jury guarantee can have occurred. Galiffa, 734 F.2d, 312.

Testing for "surprise" is certainly relevant to the issue of proper notice. Such a situation would exist, for example, where an indictment verbally described the offense charged, but fail to cite the appropriate statute involved. In such a situation, the accused could not claim a violation of his right to notice by indictment, as the verbal completeness of the indictment provided notice and prevented any surprise to the accused by virtue of the omitted

statutory citation. (See Rule 7(c), Fed.R.Crim.P. to this effect).

This lack of surprise analysis is inapt, however, in the aiding and abetting situation where, as in the case at bar, the problem is not a formal citation omission, but rather that substantive material has been added to the original indictment by the court jury instruction which was never in any form articulated to, or by, the grand jury. Thus, there was a failure to comply with the constitutional safeguard of limiting the accused's jeopardy to only those charges reviewed and handed down by an independent grand jury. Moreover, this failure resulted in a material broadening of the charge.

The proper analysis to test for a violation of the screening function of the grand jury is that employed by the Miller court and is based on an analysis of contents or elements. According to Miller, the reviewing court must test whether "the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment." Miller, 105 S.Ct. at 1815.

The First Circuit failed to apply such an analysis to the indictment in the Sanchez case. Rather than examining the elements of aiding and abetting vis a vis the elements of the substantive crime, the First Circuit merely stated conclusorily that aiding and abetting is "implicit" within the substantive crime. (A-14).

However, the Supreme Court long ago ruled that indictment by implication does not pass constitutional muster.

> "In an indictment upon a statute, it is not sufficient to set forth the offence (sic) in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence (sic) intended to be punished;. . ."

United States v. Carll, 105 U.S. 611, 26 L.Ed. 1135. (emphasis added)

To exclude aiding and abetting from the directive of the Fifth Amendment by labeling it as "a theory" is a mere semantic device. Any offense can be similarly thought of as a theory of liability, based on a series of acts or elements. When an elements analysis is applied to the aiding and abetting

situation, the First Circuit's conclusory reasoning falters, for an aiding and abetting instruction necessarily includes elements extraneous to the substantive offense. When the trial court below gave its jury instruction with regard to aiding and abetting, it was not able to do so without referring to factual elements which are not contained in the charge of substantive possession with intent to distribute:

> "To prove a defendant guilty of aiding and abetting, the government must prove beyond a reasonable doubt that the defendant knowingly helped another person to commit the crime of possession of cocaine with intent to distribute it; that that person intended to assist in that fashion; and that that defendant acted before the crime was actually completed. . .You must find beyond a reasonable doubt that the defendant acted with the knowledge of the criminal character of the offense and with the intention of

helping others directly to violate the law.

Clearly, the court's repeated references to the elements of "intent" and "knowledge" specific to the aider and abettor changed elements from those passed on by the grand jury. These extra elements amount to a clear "broadening [of] the possible bases for conviction," (Miller, 105 S.Ct., 1816) as prohibited by Miller, Stirone, et al.

The broadening impact of the court's aiding and abetting instruction was patently clear: without it, there was no legal basis for submission of Count II to the jury; with it, the jury was allowed to consider and convict on Count II.

After the government had rested its case against Mr. Sanchez, the trial court

correctly found that the evidence presented by the government was legally insufficient as to Count II.

> THE COURT: All right. Let me tell you my concern. It focuses on Rafael Sanchez in Count II. As charged, it alleges a bare violation of 841, the substantive possession with intent to distribute. The jury instructions that were given me by the government include requests for a Pinkerton charge in paragraph 14 and an aiding and abetting request in 19. The indictment does not charge in Pinkerton language and it does not include reference to section 2.
>
> Neither of those theories--it seems to me--is viable on the face of the indictment as to Rafael Sanchez,. . . . And on that premise, how do I bring Mr. Sanchez,--Rafael Sanchez--in and permit him to come in substantively? "I have no problems in denying the motions with respect to the conspiracy as to all defendants and as to Count II so far as it charges Edwin Sanchez and Gregorio Rosario. But I have a problem with Rafael Sanchez."

(R.85-86). The Court's ruling of insufficiency of evidence to convict Rafael Sanchez of substantive possession with intent to distribute, cancelled the grand jury's findings with regard to Rafael Sanchez's connection to that offense. This ruling created a void. Only by broadening the grand jury's charge to include those factual elements specific to aiding and abetting which had never been articulated to or by the grand jury, was the court able to submit Count II to the jury.

Thus, the record of Mr. Sanchez's conviction on Court II illustrates how the rule which sanctions the trial judge's offering an aiding and abetting jury instruction upon an indictment silent as to aiding and abetting puts

within the trial court's province exactly that which Bain excluded: "to change the charging part of the indictment to suit its own notions of. . .what the grand jury would probably have made it if their attention had been called to suggested changes." Bain, 121 U.S. at 10, 7 S.Ct. at 786.

Such an enlargement of the charge articulated by the grand jury is specifically anticipated and prohibited by Stirone: "Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same." Stirone, 80 S.Ct., 273.

The First Circuit, in its opinion below, Galiffa and other circuit's opinions, caution ambivalently that it is, after all, "preferable" to put the

aiding and abetting charge in the indictment. This statement is a tacit acknowledgment of the ineluctible conclusion that such a "preference," is actually a constitutional requirement.

In any prosecution, such as that at bar, which joins conspiracy and substantive counts, the accused risks conviction by associated prosecution. The true line between the factual elements necessary to sustain conviction as to one count as opposed to the other becomes blurred; the rule allowing insertion of the concept of aiding and abetting as a jury instruction puts even more stress on the jury system, and threatens to encourage an already burdened lay jury into a dragnet approach to conviction.

Thus, the full impact of the aiding and abetting instruction upon the fairness of Mr. Sanchez's trial pours over into his conviction for conspiracy as well. We have no way of knowing the true thought process of the jury, but it is certainly conceivable under the instruction below, that the message received by the jury was that it doesn't much matter why or of what Mr. Sanchez is convicted - if he's guilty of one thing, he's guilty of all.

Where such a message may have been the basis of conviction, the conviction cannot be upheld under the due process requirements of the United States Constitution.

II.

AN APPELLATE COURT MAY NOT APPLY THE UNITED STATES SENTENCING GUIDELINES SO AS TO CIRCUMVENT THE STRICT NOTICE REQUIREMENT CONTAINED IN THE FEDERAL CONTROLLED SUBSTANCES ACT.

The conflict created between the requirement that enhancement of sentence may occur only upon compliance with the strict notice provision of Title 21, Section 851(a)(1) of the United States Code, and provisions of the United States Sentencing Guidelines for non-notice enhancement, presents an important federal question which has not been, but should be, settled by this Court, especially since the decisions of several circuits regarding this sentencing question conflict with principles of

statutory construction set down by this Court in Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

The United States Congress, as part of the Controlled Substances Act of 1970, clearly provided that:

> "No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon."

21 U.S.C. Section 851(a)(1) emphasis added.

This provision, both before and since enactment of the Guidelines, has been strictly construed. Hardy v. United States, 691 F.2d 39, 42 (1st Cir. 1982);

United States v. Olson, 716 F.2d 850, 852 (11th Cir. 1983); United States v. Williams, 899 F.2d 1526, 1529 (6th Cir 1990).

However, since implementation of the United States Sentencing Guidelines, several circuits have limited application of section 851(a)(1) to allow those convicted under the Controled Substances Act to face enhancement for prior offenses without requiring the government's compliance with the notice provision legislated by Congress. United States v. Wallace, 895 F.2d 487 (8th Cir. 1990); Hansen v. United States Parole Commission, 904 F.2d 306 (5th Cir. 1990); United State v. Sanchez, 917 F.2d 607 (1st Cir. 1990)(A-38-41).

The circuits glibly conclude that the Section 851(a)(1) prohibition against

increased punishment applies only to those increases resulting from doubling of the minimum or maximum penalties and not to those increases resulting from classification as a career offender. It is true, as the First Circuit observed in the case at bar, that "there is no Sentencing Guideline requirement which makes the filing of an information a condition precedent to sentence enhancement under the Guidelines." However, this silence of the sentencing commission must not be read so as to cancel the explicit congressional directive that "no person convicted of an offense under [the Controlled Substances Act] shall be sentenced to increased punishment" absent the filing of an information by the government. Under the

rule of statutory construction set down by the court in Albernaz v. United States, 101 S.Ct. 1137 (1981), if anything is to be assumed from a legislative silence,it is that the enacting body was aware of pre-existing relevant law, and had acted with it in mind. Albernaz, 101 S.Ct. 1143-1144.[3] Unless, and until, Congress or this Court specifically rule the clear directive of Section 851(a)(1) inapplicable, petitioners, and all other persons convicted under the Controlled Substances Act, should be free from any increase in punishment by reason of prior

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3. Although the legislative body referred to in Albernaz was the United States Congress, certainly the Albernaz rule is no less aptly applied to the Sentencing Commission.

convictions absent the government's strict compliance with the notice requirement embodied in Title 21 Section 851(a)(1) of the United States Code.

III.

NCIDENTS OF PROSECUTORIAL MISCONDUCT, EACH OF WHICH ALONE MAY NOT DENY THE ACCUSED HIS CONSTITUTIONAL DUE PROCESS RIGHTS, DO RISE TO CONSTITUTIONAL MAGNITUDE WHEN OCCURRING CUMULATIVELY ON ONE RECORD.

The First District Court of Appeals upheld the District Court's denial of the Sanchez's Motion for New Trial based upon prosecutorial non-disclosure of impeachment materials. The Government never did disclose to the defense the full scope of payments received by Alberto Lagos, confidential informant and chief prosecutorial witness.

Sometime after trial, the defense discovered evidence of prosecutorial misconduct even more direct than the failure to disclose payments.[4] It is submitted that the cumulative effect of the Government's case resting almost exclusively on the paid testimony of a former criminal, together with the fact that the full extent of that informant's receipt of Governmental payments was not disclosed to the defense, together with the further fact that the same Government case agent who remained silent throughout

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4. Upon granting of this Petition, the Petitioner would move this Court for leave to supplement the record with the full contents of the sworn deposition testimony of Agent Kennedy which shows the trial testimony of Agent Brooks to have been untrue.

the trial regarding his specific knowledge of said non-disclosed payments, then took the stand to offer an untrue corroboration of the Government's star witness, taken all together does, indeed, indicate that the Sanchez's trial was not a constitutionally fair and correct one.

The events of the case at bar illustrate the imperative need for this Court to set a clear standard beyond which the Government may not stray in its efforts at prosecutorial success. In its recent decision, United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), this Court recognized its earlier observation to the effect that the prosecutor

> "is the representative not of an ordinary party to a controversy, but a sovereignty. . .whose interests in a criminal prosecution

> is not that it shall win a case, but that justice shall be done."

Berger v. United States, 295 U.S. 78,88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). Allowing the prosecution of the Sanchezes to stand on a record replete with prosecutorial errors, broadcasts acceptance of a government whose chief interests is, indeed, that it shall "win a case" even if need be by withholding information and twisting the truth.

CONCLUSION

Inasmuch as the decision of the First Circuit directly conflicts with the Grand Jury Clause of the Fifth Amendment, and with the strict notice provision of the Controled Substances Act, and further inasmuch as the First Circuit's affirmance of conviction based on a record replete with prosecutorial missteps conflicts with the basic notions of due process, the First Circuit's opinion herein represents a departure from principles integral to our Constitutional justice system, and, therefore, merits review by this Court.

Respectfully submitted,

SAMUEL I. BURSTYN
Counsel of Record

February, 1991

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1600

UNITED STATES OF AMERICA,

Appellee,

v.

EDWIN SANCHEZ,

Defendant, Appellant.

No. 89-1601
90-1058

UNITED STATES OF AMERICA,

Appellee,

v.

GREGORIO ROSARIO,

Defendant, Appellant.

No. 89-1602

UNITED STATES OF AMERICA,

Appellee,

v.

RAFAEL SANCHEZ,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Douglas P. Woodlock, U.S. District Judge]

Before

Campbell, Chief Judge,
Coffin, Senior Circuit Judge,
and Cyr, Circuit Judge.

John C. McBride with whomMcBride, Wheeler & Widegren was on brief for appellant Rafael Sanchez.

Thomas Kerner with whom Robert J. Wheeler, Jr., and McBride, Wheeler & Widegren, were on brief for appellant Edwin Sanchez.

Gregorio Rosario on brief pro se.

Brien T. O'Connor, Assistant United States Attorney, with whom Wayne A. Budd, United States Attorney, was on consolidated brief for the United States.

October 24, 1990

CYR, Circuit Judge. Defendants Gregorio Rosario and Edwin and Rafael Sanchez appeal their convictions under 21 U.S.C. Section 841 (a) and 846 for conspiring to possess, and possessing, twelve kilograms of cocaine for distribution. The Sanchezes also appeal the 360-month prison sentences imposed under the Sentencing Guidelines. We affirm.

I.

BACKGROUND

The evidence revealed that Rafael Sanchez and Albert Lagos, a government informant and its key witness, met on several occasions during July and August, 1988, at the Rafael Sanchez place of business in Somerville, Massachusetts, and discusses where Lagos could obtain

cocaine. On August 10, 1988, Rafael contacted Lagos and arranged a meeting at which Rafael informed Lagos that a friend had arrived with a shipment of thirty kilograms of cocaine. The two agreed to meet again the next day. At their August 11 meeting, Rafael told Lagos that the cocaine was "already over here." Then Rafael made a phone call to an unidentified individual. Rafael thereupon told Lagos that the price would be $23,500 per kilogram. Another meeting was arranged for later in the day, at which Rafael introduced his brother, Edwin Sanchez, to Lagos. Thereafter, the three rode around in a car, discusses the price and purity of the cocaine, and agreed to finalize the exchange that evening.

That evening, Edwin Sanchez met Lagos, and the two rode in Lagos's car to

Gregorio Rosario's apartment in Everett. Earlier, in anticipation of the cocaine exchange, Lagos had put a briefcase, containing a phone book, in the trunk of his car. Massachusetts State Trooper Joseph Brooks, accompanied by other law enforcement officers, followed Lagos and Edwin Sanchez to the Rosario apartment. Once inside the apartment, Edwin and Rosario handed Lagos a suitcase containing twelve kilograms of cocaine. Lagos and Rosario left the apartment with the suitcase and returned to the Lagos car.

The police were watching as Rosario removed the briefcase containing the phone book from the trunk of the Lagos car and replaced it with he cocaine-laden suitcase. Approximately five minutes later the Massachusetts State Police forcibly entered the Rosario apartment,

where they arrested Edwin Sanchez and Rosario and seized the briefcase, which had been smashed open. Subsequent analysis revealed that the substance inside the suitcase consisted of 12,062 grams of 95% pure cocaine. Rafael Sanchez was arrested on the following day.

II.

DISCUSSION

A. Count I

Edwin and Rafael Sanchez challenge the sufficiency of the evidence to support their conspiracy convictions under count I.

"The gist of conspiracy is an agreement to disobey or to disregard the law," United States v. Drougas, 748 F.2d 8, 15 (1st Cir. 1984), which the government may

prove by direct and circumstantial evidence, United States v. Rivera-Santiago, 872 F.2d 1073, 1079 (1st Cir. 1989). The evidence must establish that the defendants intended to agree and that they intended to commit the substantive criminal offense which was the object of their unlawful agreement. Id.; accord United States v. Flaherty, 668 F.2d 566, 580 (1st Cir. 1981). Due to the clandestine nature of criminal conspiracies, the law recognizes that the illegal agreement may be either " express or tacit" and that a "'common purpose and plan may be inferred from a development and collocation of circumstances.'" Rivera-Santiago, 872 F.2d at 1079 (quoting Glasser v. United States, 315 U.S. 60, 80 (1942)); see also Drougas, 748 F.2d at 15. The government need not establish that the defendants knew or agreed upon every detail of

the conspiracy. "All that is required is to show 'the essential nature of the plan and their connections with it.'" Rivera-Santiago, 872 F.2d at 1079 (quoting Blumenthal v. United States, 332 U.S. 539, 557 (1947)); see also United States v. Hinds, 856 F.2d 438, 443 (1st Cir. 1988).

Without weighing witness credibility, United States v. Serrano, 870 F.2d 1, 5 (1st Cir. 1989) (citing Burks v. United States, 437 U.S. 1, 16 (1978)), we assess the sufficiency of the evidence, including all reasonable inferences, in the light most favorable to the government, United States v. McNatt, 813 F.2d 499, 502 (1st Cir. 1987), with a view to whether a rational jury could have found the defendant guilty beyond a reasonable doubt. Thus viewed, there was sufficient

evidence to support the conspiracy convictions against Edwin and Rafael Sanchez.

Rafael Sanchez advised Lagos early on that a friend had arrived with a large shipment of cocaine which would be available for purchase. Rafael introduced Lagos to Edwin and discussed the price and purity of the cocaine. Finally, Rafael arranged the meeting between Edwin and Lagos on the evening the cocaine exchange took place. Although Rafael was not present during the actual exchange, a jury might infer, altogether reasonably, that Rafael intended to participate in the conspiracy to acquire cocaine for distribution, as evidence by his instrumental role in locating the cocaine and in bringing the other participants together.

As for Edwin Sanchez, the evidence established that he and brother Rafael negotiated the price and quality of the cocaine with Lagos. Further, Edwin Sanchez and Rosario personally delivered the cocaine to Lagos, expecting to receive in return, not a briefcase containing a phone book, but more than $280,000 in cash. Therefore, the jury reasonably concluded that Edwin Sanchez intended to participate in the conspiracy to possess cocaine for distribution.

B. Count II

Rafael Sanchez appeals from the denial of his motion for judgment of acquittal under count II, which charged all three defendants with the substantive offense of possessing cocaine for distribution. Rafael argues that the district

court committed reversible error by instructing the jury on "aiding and abetting" and on vicarious criminal liability under Pinker v. United States, 328 U.S. 640 (1946), inasmuch as count II did not provide fair notice that he was being under either theory.

(i) "Aiding and Abetting"

Notwithstanding the fact that count II did not charge aiding and abetting, or mention 19 U.S.C. Section 2, the jury was instructed that the defendants could be convicted if they aided and abetted the substantive offense of possessing cocaine with intent to distribute.[1] Rafael

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[1]Rosario objects to the aiding and abetting charge on the same ground. We note, however, that there was sufficient independent evidence that Rosario, unlike Rafael, possessed the suitcase containing the cocaine. Thus, Rosario's conviction under count II did not depend on the

Sanchez contends that an "aiding and abetting" instruction in these circumstances violated his sixth amendment right to "be informed of the nature and cause of the accusation" against him.

The contention fails, essentially because "aiding and abetting" is not a separate offense. United States v. Thirion, 813 F.2d 146, 151 (8th Cir. 1987); United States v. McKnight, 799 F.2d 443, 445 (8th Cir. 1986); see also United States v. Moya-Gomez, 860 F.2d 706, 756 (7th Cir. 1988). Title 18 United States Code, section 2, "simply makes those who aid and abet in a crime punishable as principals." Thirion, 813 F.2d at 151 (quoting McKnight, 799 F.2d at 445). Aiding and abetting is "an

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1 cont. "aiding and abetting" or Pinkerton theories.

alternative charge in every...count, whether explicit or implicit." McKnight, 799 F.2d at 445 (quoting United States v. Walker, 621 F.2d 163, 166 (5th Cir. 1980)). Accord United States v. Bullock, 451 F.2d 884, 888 (5th Cir. 1971); United States v. Lester, 363 F.2d 68, 72 (6th Cir. 1966). A defendant can be convicted of aiding and abetting the commission of a substantive offense "upon a proper demonstration of proof so long as no unfair surprise results." United States vs. Galiffa, 734 F.2d 306, 312 (7th Cir. 1984); accord United States v. Tucker, 552 F.2d 202, 204 (7th Cir. 1977).

All courts of appeals which have considered the matter have concluded that an "aiding and abetting" instruction may be given even though the indictment

neither alleges aiding and abetting nor adverts to 18 U.S.C. Section 2.[2] We, too, now hold that the government may rely on an "aiding and abetting" theory, although the indictment neither alleges nor adverts to it, except on a showing of

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[2] See United States v. Taylor, 464 F.2d 240, 241 n.1 (2d Cir. 1972); United States v. Forsyth, 560 F.2d 1127, 1136 n. 15 (3d Cir. 1977); United States v. Duke. 409 F.2d 669, 671 (4th Cir. 1969); United States v. Gordon, 812 F.2d 965, 969 (5th Cir. 1987); United States v. Lester, 363 F.2d at 72; United States v. Moya-Gomez, 860 F.2d at 756; United States v. Thirion, 813 F.2d at 151; United States v. Sannicandro, 434 F.2d 321, 324, (9th Cir. 1970); Lawrence v. United States, 357 F.2d 434, 438 (10th Cir. 1966); United States v. Martin, 747 F.2d 1404, 1407 (11th Cir. 1984).

unfair surprise.[3]

Rafael Sanchez and Gregorio Rosario were charged with conspiracy and with the substantive offense of possessing cocaine for distribution. The evidence adduced on those charged established that these defendants aided and abetted the substantive offense charged in count II by assisting the sale of cocaine to Lagos. Although the indictment did not allude to "aiding and abetting," it placed the defendants on notice of the essential nature of the charges against them under

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[3]We nevertheless consider it better practice, "whenever a basis for a charge of aiding and abetting is anticipated before trial, ... to have the indictment framed in the alternative or at least to have noted upon it a reference to 18 U.S.C.A. Section 2, "United States v. Duke, 409 F.2d at 671; see also Galiffa, 734 F.2d at 312 ("preferable" to charge 18 U.S.C. Section 2 in indictment).

count II. Moreover, there was no unfair surprise, as the government, prior to the trial, submitted a proposed jury instruction on "aiding and abetting."

(ii) Pinkerton Charge

Rafael Sanchez similarly claims that the jury should not have been a Pinkerton instruction.

Under the Pinkerton theory a conspirator may be subjected to vicarious criminal liability for a substantive crime committed by a co-conspirator in effecting their conspiracy. We have held that the district court may give a Pinkerton charge even though the indictment does not plead vicarious liability. See, e.g., United States v. Stackpole, 811 F.2d 689, 696 (1st Cir. 1987); United States v. Alvarez, 626 F.2d 208, 210 (1st

Cir. 1980). Indeed, every court to consider the matter has held that "the individual substantive counts need not make reference to co-conspirator liability in order for the jury to be so instructed," Thirion, 813 F.2d at 152; see also United States v. Carroll, 510 F.2d 507, 509 (2d Cir. 1975); United States v. Owen, 492 F.2d 1100 (5th Cir. 1974); United States v. Alsondo, 486 F.2d 1339 (2d Cir. 1973) (on petition for rehearing). As with the "aiding and abetting" theory, vicarious co-conspirator liability under Pinkerton is not in the nature of a separate offense. Thirion, 813 F.2d at 151. Thus, the Pinkerton charge was warranted in these circumstances on the same reasoning that supported the "aiding and abetting" instruction.

Counts I and II gave the defendants adequate notice of the essential nature of the charges against them. Prior to trial, the government submitted a proposed Pinkerton instruction, thereby alerting Rafael to the government's theory of criminal liability under count II. Thus, as concerns Rafael's vicarious liability under count II, there was no unfair surprise. Since there was sufficient evidence to enable the jury to conclude, beyond a reasonable doubt, that Edwin and Rafael Sanchez and Gregorio Rosario were members of the same cocaine conspiracy, the Pinkerton charge was proper.[4] Their claims were not raised in

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[4]We are not confronted with the sort of "marginal case" in which the Pinkerton instruction sometimes causes concern. See, e.g., Stackpole, 811 F.2d at 696; United States v. Sperling, 506 F.2d 1323,

the district court. As we often remind criminal defendants, "it is ordinarily the rule that a claim of inadequate representation will not be determined on direct appeal when the claim has not been raised in the district court." United States v. Paz Uribe, 891 F.2d 396, 398

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4 cont. 1341-42 (2d Cir. 1974). In Sperling, 506 F.2d at 1341-42, the Second Circuit appropriately cautioned that a Pinkerton charge "should not be given as a matter of course," particularly where the jury is being asked to make the converse inference; that is, to infer, on the basis of a series of disparate criminal acts, that a conspiracy existed. In the present case there was ample evidence that Rafael Sanchez was a member of the alleged conspiracy to possess cocaine for distribution. The jury was instructed to consider whether Rafael belonged to the same cocaine conspiracy (independently established under count I) in furtherance of whose unlawful object either of Rafael's co-conspirators committed the substantive offense of possessing cocaine for distribution as charged in count II.

(1st Cir. 1989) (quoting United States v. Hoyos-Medina, 878 F.2d 21, 22 (1st Cir. 1989)). See also United States v. Costa, 890 F.2d 480, 483 (1st Cir. 1989); United States v. Carter, 815 F.2d 827, 829 (1st Cir. 1987).

There are two sound reasons for the rule. First, the reviewing court benefits from careful preliminary consideration by the trial judge, who is better situated to appraise defense counsel's representation in the district court proceedings. See, e.g., Hoyos-Medina, 878 F.2d at 22. Second, "ineffective assistance" claims normally require "the resolution of factual issues as well as inquiries into other evidentiary matters that cannot effectively by handled for the first time by court of appeals."

See Costa, 890 F.2d at 483. "[W]hile some ineffective assistance claims might be capable of presentation solely on the record of the criminal trial itself, most such claims require the independent development of evidence outside of, and collateral to, the criminal proceedings." Brien v. United States, 695 F.2d 10, 13 (1st Cri. 1982). Usually these claims are better left to collateral review under 28 U.S.C. Section 2255. See Costa, 890 F.2d at 483.

The Sanchezes base their "ineffective assistance" claims on two grounds. First, their counsel did not request that the court allow the jury to hear a tape recording produced by the government in response to a discovery request. Second, their counsel did not obtain daily tran-

scripts with which to impeach government witnesses. Without a more developed factual record, we are unable to evaluate the merit of these claims. "If the defendant[s] wish[] to pursue th[ese] claim[s], [they] may begin a collateral proceeding in accordance with 28 U.S.C. Section 2255." Paz Uribe, 891 F.2d at 398.

At the sentencing hearing, Rosario claimed that he had been denied effective assistance of trial counsel. Rosario filed a pro se motion for new trial as well, which relied in part on an "ineffective assistance" claim. At the hearing on the motion for new trial, Rosario was represented by new counsel who did not mention the ineffective assistance claim. Rosario now asserts

that pretrial counsel failed to file and-/or pursue various pretrial discovery and suppression motions, including suppression motions relating to the voluntariness of Rosario's confession and the legality of the search of Rosario's apartment. Since the "ineffective assistance" claim was not pursued at the hearing on the motion for new trial, "the issue really cannot be said to have been raised or explored properly below." See Costa, 890 F.2d at 483. Thus, without a more fully developed record, we cannot conduct effective review of Rosario's "ineffective assistance" claims on direct appeal.

D. The Guidelines Sentences

Under the Sentencing Guidelines, the district court imposed 360-month prison

sentences on Edwin and Rafael Sanchez. The Sanchezes challenge these sentences on five grounds: first, the district court should have departed downward from the guideline sentencing range; second, the district court erroneously denied their requests to compel the attendance of Albert Lagos, the government's informant, at the sentencing hearing; third, their sentences violated due process; fourth, their "criminal history" classifications as "career offenders" were based on erroneous evaluations of their prior drug conviction records; and, finally, their sentences as "career offenders" under U.S.S.G. Section 4B1.1, United States Sentencing Commission, Guidelines Manuel, Section 4B1.1 (Nov. 1987), contravened 21 U.S.C. Section 851.

We conclude that none of these assignments of error, alone or in combination, warrants disturbing the sentence of either defendant.

(i) Downward Departure

The Sanchezes attempt to appeal the district court's refusal to impose a sentence below the guideline sentencing range pursuant to U.S.S.G. Section 5K2.10, p.s. In particular, defendants contend that the ten year hiatus since their last previous drug convictions suggests that the current transaction represents an "aberration," rather than an indication of their criminal proclivities. As we are without appellate jurisdiction, we dismiss their claims without discussion. United States v. Tucker, 892 F.2d 8 (1st Cir. 1989)(district court

decision not to depart below guideline sentencing range, not appealable.)[5]

(ii) Attendance of Lagos

Edwin and Rafael Sanchez contend that the district court erroneously refused to compel the government's informant and chief witness, Albert Lagos, to attend their sentencing hearings. The defendants assert that cross-examination of Lagos could have demonstrated entrapment, thereby establishing

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5. Other courts of appeals are of the same mind. See, e.g., United States v. Colon 884 F.2d 1550 (2d Cir. 1989); United States v. Denardi, 892 F.2d 269 3rd Cir. 1989); United States v. Buenrostro, 868 F.2d 135 (5th Cir. 1989); United States v. Draper, 888 F.2d 1100 (6th Cir. 1989; United States v. Franz, 886 F.2d 973 (7th Cir. 1989); United States v. Evidente, 894 F.2d 1000 (9th Cir. 1990); United States v. Fossett, 881 F.2d 978 (11th Cir. 1989).

a basis for a downward departure pursuant to U.S.S.G. Section 5K2.10, p.s. The district court refused their request because it found that Lagos had been subjected to "lengthy, vigorous and probing" cross-examination at trial.

Guideline section 5K2.10 allows the court to sentence below the sentencing range "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior. . . ." Id. Without acceding to defendants' characterization of Lagos as "victim," and his conduct as "wrongful," we conclude that section 5K2.10 is unavailing. Section 5K2.10 "usually [is] not. . .relevant in the context of non-violent offense." Id. Moreover, the Sentencing Commission's example of an "unusual" circumstance in

which section 5K2.10 might apply in the case of a non- violent crime (i.e., when "an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation") bears no likeness to the present circumstances.

The district court did not err in declining to compel Lagos to attend the sentencing hearings.

(iii) Due Process

The Sanchezes challenge their sentences on due process grounds as well.

First. they argue that the Sentencing Guidelines violate their due process right to a fair sentencing determination in that the district court was permitted to consider sentencing information not established beyond a reasonable doubt.

See United States v. Davis, 715 F.Supp. 1473 (C.D. Cal. 1989).[6] The government need not demonstrate beyond a reasonable doubt every evidentiary consideration which enters into a sentencing determination under the Sentencing Guidelines. United States v. Wright, 873 F.2d 437, 441 (1st Cir. 1989).[7] Insofar

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6. Defendants rely entirely on Davis, which held the Sentencing Reform Act of 1984 unconstitutional because it "required" the court to consider sentencing information neither "introduced at trial [n]or proved beyond a reasonable doubt." Davis, 715 F.Supp. at 1476. We are aware of no court which presently follows Davis. See, e.g., United States v. Ross, 905 F.2d 1050, 1054 (7th Cir. 1990); United States v. Restropo, 903 F.2d 648 (9th Cir. 1990); United States v. Frederick, 897 F.2d 490, 493 (10th Cir. 1990); United States v. Candito, 892 F.2d 182, 186 (2d Cir. 1989).

7. See, e.g., United States v. Wilson, 900 F.2d 1350, 1353 (9th Cir. 1990)

as disputed factors were considered by the sentencing court, the present defendants were accorded a reasonable opportunity to rebut the challenged information. Due process requires no more. See United States v. Fogel, 829 F.2d 77, 90 (D.C. Cir. 1987)(due process requires

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7. cont. (citing to appellate cases which hold that due process does not require the establishment, beyond a reasonable doubt, of facts underlying sentencing determinations under the Sentencing Guidelines.) The Guidelines require that the sentencing information which the sentencing judge considers bear "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. Section 6A.1.3(a). All courts of appeals which have considered the issue, including our own, see Wright, 873 F.2d at 441, have held that due process is satisfied if the facts relied on in Guidelines sentencings are proven by a preponderance of the evidence. See United States v. Guerra, 888 F.2d 247, 251 (2d Cir. 1989); United States v. McDowell, 888 F.2d 285, 291 (3rd Cir. 1989): United States v. Urrego-Linares, 879 F.2d 1294, 1238 (4th Cir. 1989); Wilson, 900 F.2d at 1354.

that sentence not be based on false information and that defendant be given opportunity to rebut challenged information); United States v. Collins Spencer Catch the Bear, 727 F.2d 759, 761 (8th Cir. 1984)(same).

The second due process claim the Sanchezes make is that the district court applied the Guidelines too mechanically and did not take adequate account of their individual circumstances. The present contention is foreclosed, however, as we, see United States v. Seluk, 873 F.2d 15, 16 (1st Cir. 1989), like other courts of appeals,[8] have held that the Sentencing Guidelines impose no unconsti-

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8. See, e.g., United States v. Vizcaino, 870 F.2d 52, 53 (2d Cir. 1989); United States v. Frank, 864 F.2d 992, 1009-10 (3d Cir. 1988); United States v.

Constitutional constraints on individualized sentencing, considering the broad range of variables cognizable by the sentencing court and its discretion to depart in appropriate circumstances.

(iv) Criminal History Classifications

The Sanchezes contend that they were assigned erroneous "criminal history" classifications under U.S.S.G Section 4A1.2(e) on the basis of prior criminal convictions for possessing and distributing narcotics, for which each was

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8. cont. Bolding, 876 F.2d 21, 22 (4th Cir. 1989); United States v. Woolford, 896 F.2d 99, 101-02 (5th Cir. 1990); United State v. Jacobs, 877 F.2d 460, 462 (6th Cir. 1989); United States v. Pinto, 875 F.2d 143, 144-45 (7th Cir. 1989); United States v. Sciacca, 879 F.2d 415, 416 (8th Cir. 1989); United States v. Brady, 895 F.2d 538, 539 (9th Cir. 1990); United States v. Thomas, 884 F./2d 540, 542-43 (10th Cir. 1989); United States v. Erves, 880 F.2d 376, 379 (11thCir. 1989).

sentenced to six years in the Massachusetts Correctional Institute at Concord but actually served less than "one year and one month," see U.S.S.G. Section 4A1.2(e)(1). Therefore, they argue, the district court erred by treating their "Concord sentences" as felonies.

Their argument is immaterial to the "career offender" classification criteria established under the Guidelines. Sentencing Guidelines section 4B1.1 defines a "career offender" as a defendant who (1) was at least eighteen at the time of the present offense, (2) was convicted of "a felony that is. . .a controlled substance offense," and (3) "has at least two prior felony convictions of. . .a controlled substance offense." U.S.S.G. Section 4B1.1. At the time these

defendants were sentenced, a "controlled substance offense" included "distributing, dispensing, or possessing with intent to. . .distribute, or dispense, a controlled substance (or counterfeit substance)." Id. Section 4B1.2, comment (n.2).[9] A "prior felony is defined as "a prior adult federal or

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9. Effective November 1, 1989, U.S.S.G. Section 4B1.2 was amended and application note 2, defining "controlled substance offense," was deleted. Guidelines section 4B1.2(20 now defines a "controlled substance offense" as "an offense under a federal or state law prohibiting the manufacture, import, conviction" export, or distribution of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, or distribute." U.S.S.G. Section 4B1.2(2)(Nov. 1989). Application note 3, defining "prior felony conviction" has not been amended.

state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed." Id. Section 4B1.2, comment (n.3)(emphasis added). As the application note makes manifest, the type and term of the sentence previously imposed or served are immaterial to the "career offender" classification required under the Guidelines. Instead, only the maximum term of imprisonment under the controlling criminal statute may be considered in determining whether there was a prior felony conviction.

Rafael Sanchez was convicted of three prior offenses relating to controlled substances, each subject to a

statutory maximum prison term of fifteen years.[10] Edwin Sanchez previously was convicted of two controlled substance offenses,[11] one carrying a maximum term of fifteen years and the other ten years. Since all of their prior convictions for crimes involving controlled substances were punishable by prison terms in excess

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[10] In 1973, Rafael was convicted of possessing a narcotic (heroin) with intent to distribute. In June of 1978, he was convicted of possessing a Class A. substance with intent to distribute. In July of the same year, he was convicted of possessing a controlled substance heroin with intent to distribrute. Under Massachusetts law, each violation was punishable by a fifteen year prison term. M.G.L. c.94C Section 32E.

[11] On June 2, 1976, Edwin was convicted of possessing a Class B substance (cocaine) with intent to distribute, an offense punishable by a maximum term of fifteen years. M.G.L. c.94C Section 32E.

of one year, the Sanchezes were correctly classified as "career offenders" under the Guidelines. See U.S.S.G. Section 4B1.2 n.3.

(v) Section 851

Edwin and Rafael Sanchez claim that the district court violated 21 U.S.C. Section 851(a) (1) and denied their right to due process by sentencing them as "career offenders" under U.S.S.G. Section 4B.1.

Section 851(a) (1) requires the prosecutor to file an information particularizing the prior convictions on the basis of which a defendant "convicted of an offense under this part," (emphasis added), i.e., under 21 U.S.C. Section 841 et seq., is given an enhanced

sentence.[12] The section 851(a) (1) enhancement notice requirement applies "to situation in which a convicted defendant's statutory minimum or maximum penalty is enhanced under [21 U.S.C.

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[12] The relevant part of section 851(a) (1) states:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

21 U.S.C. Section 851(a) (1) (emphasis added). There is no Sentencing Guidelines requirement which makes the filing of an information a condition precedent to sentence enhancement under the Guidelines.

Sections 841, et seq.], and not to situations in which the defendant is assigned a guideline base offense level and receives an increased sentence...." which remains within the statutorily prescribed minimum-maximum range. United States v. Wallace, 895 F.2d 487, 490 (8th cir. 1990) (emphasis added). Accord Hansen v. United States Parole Com., 904 F.2d 306 (5th Cir. 1990).

These Guidelines sentences were not imposed as a consequence of the enhancement of either the minimum or the maximum sentence prescribed by 21 U.S.C. Section 841(b)(1)(A). The government concedes that the defendants were subject to the statutory ten-year minimum sentence mandated by 21 U.S.C. Section 841 (b)(1)(A), rather than the twenty-

year minimum which would have been applicable on account of their prior felony drug convictions if the prosecutor had filed the section 851 (a)(1) sentence enhancement information. Although their drug conviction records formed the basis for the Guidelines determination that the defendants are "career offenders," their 360-months' sentences were well below the life imprisonment term prescribed as the statutory maximum under section 841.

Therefore, neither section 851(a) nor any due process right was transgressed by these sentences.

E. Motions for New Trial

The Sanchezes finally contend that the district court erroneously denied

there motion for new trial, see Fed. R. Crim. P. 33, which was predicated on their allegation that the government, throughout pretrial discovery and trial, failed to reveal payments which its informant, Albert Lagos, received from the Commonwealth of Massachusetts for similar informant services in unrelated cases. The defendants moved during pretrial discovery for the production of "any material or information that can be used for the purpose of impeaching the credibility of any person the Government intends to call as a witness at the trial." The government responded with specific information concerning Lagos's criminal record and the large monetary payments and other non-monetary benefits received by Lagos from the Federal

Bureau of Investigation and the Drug Enforcement Administration. At trial, Lagos was thoroughly cross-examined about this information.

After trial, the defendants learned that Lagos had received substantial payments from the Commonwealth of Massachusetts as well. The defendants argue that newly discovered evidence would have enabled them to further undermine Lagos's credibility with the jury. Since Lagos's credibility was important to the government's case, defendants urge that the government's nondisclosure deprived them of their right to fair trial. See United States v. Bagley, 473 U.S. 667, 675 (1985); United States v. Agurs, 427 U.S. 97, 107-108 (1976).

The government denies awareness, until after trial, that Lagos received payments from the Commonwealth of Massachusetts. Further, it contends that it was under no obligation to discover or produce information related to payments Lagos received from the Commonwealth. The district court characterized the latter contention as "an invitation to very unpleasant consequences," but ruled, under our Wright-Martin standard, that the newly discovered evidence was merely cumulative and would not have led to the acquittal of any defendant. See United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980); United States v. Martin, 815 F.2d 818

(1st Cir. 1987).[13]

While Wright-Martin "ordinarily" provides the rule of decision governing motions for new trial based on newly discovered evidence, prosecutorial non-disclosure is subjected to a more stringent standard. See United States v. Imbruglia, 617 F.2d 1, 4 and n.4 (1st

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[13]The Wright-Martin standard ordains that a new trial

> ordinarily not be granted unless the moving party can demonstrate that (1) the evidence was unknown or unavailable to the defendant at the time of the trial; (2) failure to learn of the evidence was not due to lack of diligence by the defendant; (3) the evidence is material, and not merely cumulative or impeaching; and (4) it will probably result in an acquittal upon retrial of the defendant.

Martin, 815 F2d at 824.

Cir. 1980); Mains v. Butterworth, 619 F.2d 83, 86 (1st Cir. 1980); United States v. Walgren, 885 F.2d 1417, 1427-28 (9th Cir. 1989). "If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be not special significance in the prosecutor's obligation to serve the cause of justice." Agurs, 427 U.S. at 112. Prosecutorial nondisclosure of exculpatory evidence requested by an accused "violates due process where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87. since

impeachment evidence is "exculpatory" under Brady, United States v. Ingraldo, 793 F.2d 408, 411 (1st Cir. 1963), the question we ask in a prosecutorial nondisclosure setting is "whether the omitted evidence is of sufficient materiality to call for a new trial." Imruglia, 617 F.2d at 4.[14]

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[14] United States v. Agurs, 427 U.S. 97, contrasts the materiality standard applicable to prosecutorial nondisclosure in response to a specific request from the defense, with the standard applicable when there has been no defense request or only a general one. In the latter circumstance, the Supreme Court concluded, on the one hand, that there was no constitutional requirement that the prosecution surrender its entire file to the defense. Agurs, 427 U.S. at 111. On the other hand, the Court rejected any standard which would impose on the defendant "the severe burden of demonstrating that newly discovered [nondisclosed] evidence probably would have resulted in acquittal." Id.

The Supreme Court in Bagley formulated a uniform standard of materiality for general application in all nondisclosure cases. See Bagley, 473 U. S. at 682 ("The evidence is material

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14 cont. Agurs "did not define the standard of materiality applicable to a [nondisclosure in response to a specific request for discovery], but suggested that the standard might be more lenient to the defense than in the situation in which the defense makes no request or only a general request." Bagley, 473 U.S. at 681. Thus, the Supreme Court explicitly rejected the suggestion that Agurs had established that the materiality test for newly discovered evidence, not disclosed in response to a specific request, was whether the evidence "might have affected the outcome of the trial." Bagley, 473 U.S. at 681. See e.g., Imbruglia, 617 F.2d at 4-5. According to Bagley, 473 U.S. at 681 n.12, the Agurs language does not establish a standard, but "merely explains the meaning of the term 'materiality.'"

only if there is a reasonable probability that, had the evidence been diclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficent to undermine confidence in the outcome."). See also United States v. Pandozzi, 878 F.2d 1526 (1st Cir. 1989) (applying Bagley standard to nondisclosure of evidence in government's possession).[15]

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[15]Before Bagley, 473 U.S. 667, we expressed reservations whether the "probable acquittal" standard would apply to newly discovered evidence useful only for impeachment purposes, see United States v. Strahl, 590 F.2d 10, 13 (1st Cir. 1978), and cases cited therein, but left the matter open, see United States v. Imbruglia, 617 F.2d at 7; Mains v. Butterworth, 619 F.2d at 86. Of course, the matter has been resolved by Bagley, which involved impeachment evidence.

When determining whether newly discovered evidence is material, the "possibility" that the prosecutorial nondisclosure could have had an adverse effect upon the defense is assessed "in light of the totality of the circumstances and with an awareness of the difficulty of reconstruction in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." Bagley, 473 U.S. at 683 (Blackmun, J.); see also Agurs, 427 U.S. at 112-113. Due to its "inherently fact-bound nature," Bagley, 473 U.S. at 685 (White, J., concurring), the district court's determination on the materiality of newly discovered evidence in prosecutorial nondisclosure

cases is ordinarily accorded deference, see Pandozzi, 878 F.2d at 1528; Imbruglia, 617 F.2d at 7; Agurs, 427 U.S. at 113-14.

Lagos received $11,600 from the Commonwealth of Massachusetts for services in criminal investigations unrelated to the present case. At trial, he admitted receiving more than $100,000, as well as nonmonetary benefits, from federal agencies. Lagos was thoroughly cross-examined about the large monetary payments and other benefits received from federal agencies in connection with this case, as well as other federal investigations. See Unites States v. Roberts, 848 F.2d 906, 908 (8th Cir. 1988) (in light of "vigorous and thorough cross-examination' at trial, held:

suppressed Brady material would not have enabled defense to further undermine witness credibility so as to alter outcome of trial). We consider it significant to the present analysis not only that the newly discovered Commonwealth payments were small in comparison with the federal largesse and that the federal government did not know of their existence, but that the federal payments about which the jury was fully informed were for services similar to those provided to the commonwealth, except that the latter did not relate to the present case. We note further that the defense made no specific pretrial discovery request for informant payments to Lagos from any source, much less from state to local sources in unrelated cases. More-

over, it must be remembered that the government's nondisclosure did not preclude a broader ranging cross-examination of Lagos to include payments he may have received form state and local government sources.

Finally, and most importantly, the newly discovered evidence was merely cumulative. Thus, under the Bagley standard, the motion for new trial was correctly denied as the availability of the newly discovered cumulative evidence could not undermine confidence in the fairness of the trial. Since cumulative evidence is not "material to either guilt or punishment," the unavailability of cumulative evidence does not deprive

the defendant of due process.[16] See United States v. Weintraub, 871 F.2d 1257, 1264 (5th Cir. 1989) (undisclosed evidence cumulative, therefore not material to conviction); Smith v. Kelso, 863 F.2d 1564, 1573 (11th Cir. 1989) (cumulative evidence fails to establish that nondisclosure undermined confidence in outcome of trial); United States v. Shelton, 588 F. 2d 1242, 1248 (9th Cir. 1978) ("Impeachment evidence even that which tends to further undermine the credibility of the key Government witness whose credibility has already been

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[16] Like the learned district judge, we too are reminded of the observation "about the fellow who know how to spell banana, but...didn't know when to stop. It [would have been] the same thing over and over again."

shaken due to extensive cross-examination, does not create a reasonable doubt that did not otherwise exist when that evidence is cumulative or collateral.") (Brady material suppressed by government) (citations omitted).

F. Rosario's Pro Se Claims

In two supplemental pro se briefs, Rosario asserts four separate not raised at trial.

First, Rosario attempts to assert a due process claim based on alleged prosecutorial misconduct in introducing perjured testimony adverse to Rosario, while withholding exculpatory evidence. The apparent basis for this claim is a tape recording which the government allegedly made of a conversation among

law enforcement officers on surveillance duty. Rosario does not provide us with the tape or with a transcript. We are not informed as to the present whereabouts of the tape, or how and when Rosario learned of its existence. Yet Rosario purports to know of its existence and asserts several conclusory allegations of official wrongdoing based on the tape. We are unable to make an intelligent assessment of these claims. It is "the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation are deemed waived." United States v. Zannino, 895 F.2d 1, 17, (1st Cir. 1990). Nevertheless, in view of Rosario's pro se status and the serious nature of the due pro-

cess claim we dismiss the claim without prejudice to defendant's right to present it on a proper record pursuant to 28 U.S.C. Section 2255. See also infra note 17.

Second, Rosario asserts a Speedy Trial Act violation, under 18 U.S.C. Section 3161(c), based on the 158-day delay between his indictment and trial. All but 31 days, at most, were excludable as delay occasioned by the pendency of motions filed by Rosario or by the Sanchezes, with whom he was joined for trial. See id. Section 3161(h)(1)(F); United States v. Noone, ____ F.2d ____, slip op. No. 89-1691 (1st Cir. September 6, 1990), at 6.

Third, Rosario asserts that the district court deprived him of due proc-

ess by refusing to allow him to attend the hearing on his pro se motion for new trial. There was no due process violation. As the district court noted at the consolidated hearing on defendant's motions for new trial, due process guarantees an accused's "right to be present at any stage of the criminal proceeding that is critical to its outcome if [the accused's] presence would contribute to the fairness of the procedure." Kentucky v. Stincer, 482 U.S. 730. 745 (1987). Since the issue under consideration at the hearing on the motion for new trial, we are not persuades that appellant's presence would have contributed to the "fairness of the proceeding." Compare Fed. R. Crim. P. 43(c)(3) ("defendant shall be present at

the arraignment, at the time of the plea, at every stage of the trial..., and at the imposition of sentence...") with Fed. R. Crim. P. 43(c)(3) ("defendant need not be present...(3) At... argument upon a question of law.").

Finally, we are unable to discern any unconstitutionality in the district court directive that Rosario's counsel of record, retained after trial, represent Rosario at the hearing on the motion for new trial. Rosario informed the district court in advance of the hearing that he had dismissed post-trial counsel and wished to appear pro se. At the hearing on the motion for new trial, Rosario's post-trial counsel appeared and advised the court that he had been asked by Rosario to withdraw;

yet he had not withdrawn his formal appearance. As we just noted, the district court, under Kentucky v. Stincer, 107 S. Ct. at 2667, denied Rosario's request to appear pro se and determined that Rosario's retained counsel was competent to represent him on the legal issues raised by the motion for new trial. Rosario asserts no claim that retained counsel's representation at the hearing on the motion for new trial was ineffective.[17]

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[17] However, there is an allegation that the same attorney who represented Rosario at the hearing on the motion for new trial rendered "ineffective assistance" prior to the hearing. It is contained in what purports to be a typed copy of a letter, dated 9/13/85.

> On or about May 9, 1989 Honorable Woodlock J. postpone (sic) sentensing (sic) date from May 9 too (sic) May 23, 1989.

The district court judgments are affirmed.

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17. cont. so that you had some time to investigate the perjury that I pointed out to him on the part of the government witnesses. For some reson (sic) you never comply (sic) with my request, to point out the perjury on (sic) the (sic) of the government witnesses. After I was sentence (sic) again I requested of you to contact the United States Attorney (sic) Office and explaned (sic) to him that we do have a tape recording that would prove the perjury on the part of the government witnesses, who testified in my case and that due to fales (sic) testimony the jury found me gilty (sic). As my record shows you never complyed (sic) with my request. At this time I respectfully do ask of you to file a motion to withdraw from my case # 88-246-WD at once.

Letter of 9/13/85 (marked by pro se appellant as "A-2"). This letter charges counsel with ineffective assistance in not investigating Rosario's allegations of perjury by government witnesses. We surmise that these allegations may be related to the due process claim Rosario asserts in his pro se supplemental brief. See supra at 26. Our disposition of the present appeal is without prejudice to Rosario's right to raise a sixth amendment ineffective assistance claim on these grounds pursuant to 28 U.S.C. Section 2255.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1602

UNITED STATES,
Appellee,

v.

RAFAEL SANCHEZ
Defendant, Appellant

Before

Campbell, Circuit Judge,
Coffin, Senior Circuit Judge, and
Cyr, Ciruit Judge.

ORDER OF COURT
Entered: November 21, 1990

Upon consideration of appellant's petition for rehearing, It is ordered that the petition for rehearing be denied.

By the Court:

Clerk